No. 1367

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO., Claimant of the American Steamer "Santa Ana,"
Appellant.

vs.

THE STANDARD THEATRE CO.,
Appellee.

APPELLANT'S BRIEF.

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STATEMENT OF FACTS.

In June, 1900, the steamer "Santa Ana" was on a voyage from Seattle to Nome with passengers and a general cargo of merchandise.

Fire broke out in the cargo, and, for the general safety, it became necessary to inject steam into the hold for the purpose of extinguishing the fire. It took some three days to subdue it. (p. 197.) After the fire was extinguished the hatches were removed and a portion of the cargo, totally damaged, was cast overboard.

The vessel then proceeded to her destination at Nome, Alaska, where her cargo was discharged, and much of it found damaged by fire, smoke and steam.

There was at that time no government, courts, nor any other means at Nome by which contribution in general average could have been made, ascertained, adjusted, assessed or paid. (Libel, Art. VII, p. 17.)

Arrangements were therefore made with Mr. Gollin, a representative of the San Francisco Board of Marine Underwriters, to survey and assess the damage to the cargo.

On account of the conditions then prevailing it was impossible to secure general average bonds (p. 778), and as the cargo-owners, including the libelant, were extremely anxious to possess themselves of their goods, to the end that they might proceed with their venture, it was arranged at first that they should make a deposit equal to ten per cent of the value of the goods, to cover general average.

Before the examination of the cargo had proceeded very far, it was concluded that it would be fair to allow in every case a minimum *damage* of ten per cent, and inasmuch as this damage equalled the amount of the deposit, the latter was waived, and the deposits all immediately returned to consignees.

The adjuster then made an examination of the goods and issued to each shipper a certificate showing the amount of damage found by him. (pp. 771-2.) In this arrangement the libelant participated, and a certificate was issued to him showing a total damage of $3,617.03 by

fire and steam. The libelant now contests that award on the ground that the examination of his goods was not thorough.

Subsequently, and immediately upon the return of the vessel to the port of San Francisco, to wit, in October, 1900, the matter was placed in the hands of an average adjuster for adjustment (p. 144), and everything within reason done by the ship-owner to forward the same. Owing, however, to the nature of the case and the illness and subsequent death of the adjuster, the matter passed into the hands of a second adjuster, and was not completed until December, 1902. Originally, the libelant had furnished the adjuster with affidavits evidencing a total damage by *fire,* steam and water, of $12,339.68. (See adjustment, Malloy's affidavit of July 16, 1900.) Subsequently, and in April, 1902, and July 10, 1902, these affidavits were amended so as to increase the damage claimed to $17,272, *exclusive of the damage by fire.* (p. 100.) These latter affidavits form the basis of the adjustment in question. (pp. 121-122.)

When the adjustment was finally concluded, the ship-owner refused to accept it as a true or correct adjustment, and alleged, among other things, that the amount of the loss and damage of this libelant was greatly inflated and incorrect.

That the adjustment was not a true or correct adjustment seems conceded by all parties.

Mr. La Boyteaux, the representative of Johnson-Higgins, the adjusters, himself says that it was not an accurate adjustment, but simply the best they could do

under the circumstances, because the proofs were not then obtainable. With respect to the claim of the libelant, the adjustment was based upon the second affidavit, made two years afterwards, and without anything to check it up. (pp. 121-2.) The learned District Court also recognizes that the adjustment is not correct, though he thinks it is not unfair to the ship-owner. We contend that even in that conclusion he has erred. (pp. 866-7.)

It further appears in the evidence, that the libelant's goods were shipped under a bill of lading containing, among others, the following provisions:

(a) "General average, if any, to be adjusted according to the York-Antwerp Rules of 1890."

(b) "It is agreed that no lien shall attach to any of the vessels employed in the performance of this contract for any breach thereof, and such lien is hereby waived."

(c) "It is further stipulated and agreed that in all cases of loss of any portion or the whole of said goods and merchandise, the amount of claims shall be restricted to the cash value of such goods or merchandise at the original port of shipment, and that all claims for either partial or total loss or *damage* shall be ascertained and *adjusted* upon the same basis of value."

(d) "In the event that said Seattle & Yukon Transportation Company shall become liable for any injury, damage or loss to said property, it shall receive the benefit of any insurance thereon in favor of the shipper, owner or consignee."

The learned District Court held that these provisions of the bill of lading did not qualify or in anywise relate to a claim in general average and therefore, upon exceptions to the answer, ruled out all defenses based upon the foregoing provisions of said bill of lading.

The cause having proceeded to trial, evidence was introduced by the libelant,—no doubt upon the theory that, on account of its conceded inaccuracy, the adjustment was not binding,—with a view of having the court make an adjustment. The court, however, held that the adjustment made by Johnson-Higgins was "approximately correct and just and certainly not unfair to the owner of the ship" (p. 866), and ordered a decree in favor of the libelant and against the ship-owner for the *total amount* stated in said adjustment as due to said libelant *from all contributing interests,* notwithstanding the adjustment awards against the ship and freight only such proportion thereof as $91,928 bears to $157,082. (p. 153.)

It is the contention of the appellant that the court erred, first, in disregarding the above mentioned provisions of the bill of lading in determining the ship-owner's liability; second, in adopting the inaccurate and imperfect adjustment of Johnson-Higgins as a true adjustment, and basing his judgment thereon; three, if the said adjustment be conceded to be the basis of libelant's right, then the court erred in entering judgment against the ship-owner for the entire amount to be contributed to the libelant, instead of for the ship's individual proportion or contribution.

I.

THE COURT ERRED IN DISREGARDING THE PROVISIONS OF THE BILL OF LADING IN DETERMINING THE SHIP-OWNER'S LIABILITY.

As already indicated, the bill of lading contained a provision that general average, if any, should be adjusted according to the York-Antwerp Rules of 1890. These rules provide what shall, and what shall not, constitute general average acts, and also provide what shall, and what shall not, contribute in general average, as well as the method and mode of adjustment (pp. 752-762.)

By this provision of the bill of lading, therefore, the entire question of general average, as set forth in those rules, *is incorporated in and made a part of the bill of lading.*

It cannot, therefore, be said, that in this case, as between individual consignees and the ship, the conditions by which the right to contribution in general average against the ship shall be controlled, were not a part of the contract of carriage.

We therefore contend that the following provisions of the bill of lading hereinabove referred to, being also a part of the contract of carriage, should have been given full effect, namely:

(b) "It is agreed that no lien shall attach to any of the vessels employed in the performance of this contract for any breach thereof, and such lien is hereby waived."

(c) "It is further stipulated and agreed that in all cases of loss of any portion or the whole of said goods

and merchandise, the amount of claims shall be restricted to the cash value of such goods or merchandise at the original port of shipment, and that all claims for either partial or total loss or *damage* shall be ascertained and *adjusted* upon the same basis of value."

(d) "In the event that said Seattle & Yukon Transportation Company shall become liable for any injury, damage or loss to said property, it shall receive the benefit of any insurance thereon in favor of the shipper, owner or consignee."

Upon this subject, however, the learned District Court held that the office of the bill of lading is to provide for the rights and liabilities of parties in reference to the contract of carriage, *and is not concerned with the liabilities for general average;* that hence, stipulations in the bill of lading exempting the carrier of the ship from liability for all damages and loss arising from certain causes specified, will not create an exemption from liability for contribution in general average.

The only authority cited by the court for this proposition is the American and English Encyclopædia of Law, 2nd Edition. While not meaning to criticize the use of that work as authority for general principles, we do not think it can safely be relied upon where distinctions arise by reason of variation in the facts to which the principle applies, nor indeed where a careful analysis of conflicting decisions is required.

Whatever may be said upon the general proposition that the right to contribution in general average does or does not arise out of the contract of carriage,—and

as to this we hope to show that it does so arise,—it is certain that this case lies within an exception recognized even by those authorities that lay down the rule announced by the learned District Judge. This exception is due to the express incorporation into the bill of lading, as above indicated, of the rules providing when, and under what conditions, general average shall be awarded.

The question has been the subject of much academic discussion in both England and America, and has in the former country been finally settled by a decision of the House of Lords.

In many cases dicta may be found where the courts seemingly overlook the fundamental principles underlying legal obligations, but the following cases best illustrate the final development of the question.

In STEWART vs. WEST INDIES & PACIFIC STEAMSHIP CO. (1873) L. R. 8 Q. B. 88, 362, the bill of lading provided: "Average, if any, to be adjusted according to British custom." The plaintiffs' cargo was destroyed by water poured into the ship's hold to extinguish a fire. It was held that the plaintiffs were *not entitled to a general average contribution* because, according to British custom, such a loss was not a general average loss. This would seem to be a direct recognition of the principle that the right to general average is controlled by the terms of the contract of carriage.

SCHMITT vs. ROYAL MAIL STEAMSHIP CO. (1876), 45 L. J., Q. B. 644, and CROOKS VS. ALLAN (1879), 5 Q. B. D., 38, 40, find their ratio decendi in the following language of Lord Justice Lush:

"The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract of carriage, and is not concerned with liabilities to contribution in general average,"
adding, however,
"and *unless the contrary appears,* the words must be so construed."

In the CARRON PARK (1890), 15 P. Div., 203, the charter-party provided that the ship-owners should be relieved from liability for the negligence of their servants. Of course, it is well settled law that no one is entitled to contribution in general average where the loss arises from his negligence. It was, however, in this case held, that, inasmuch as the ship-owner was, *under the terms of the charter-party,* not responsible for the negligence of his servants, he was entitled to contribution in general average, notwithstanding the loss arose from such negligence.

That case has ever since been the law of England. As said in MILBURNE vs. JAMAICA FRUIT CO., (1900), 2 Q. B. 540:

"The decision in the Carron Park has been acted upon in practice in this country ever since it was given, and we are now asked to overrule it. It was expressly approved of by Gorrell Barnes, J., in the Mary Thomas, and my Brother Mathew does not doubt its accuracy in his judgment now appealed from; and in my opinion, it correctly followed out the decision of the Privy Council delivered by Lord Watson in Strang, Steel & Co. vs. Scott & Co. I believe the Carron Park is in accord with

the law of England relating to general average in this country."

It will be observed that in the CARRON PARK no mention is made in the charter-party of general average, but the clause providing exemption for negligence is a general clause disassociated from any provision as to general average. As this is now the law of England, it would seem to indicate that the limitation announced by Lord Justice Lush, viz., that "unless the contrary appears," the words of the bill of lading must be construed as not relating to liability to contribution in general average, is thereby overruled.

We do not wish, by the foregoing, to be understood as maintaining that, in this country, a stipulation relieving a carrier from liability for negligence would be valid, for it is not. But the stipulations in the present bill of lading are not negligence exemptions. Inasmuch as the negligence exemption *is* valid in England, the fact that it is not valid here does not affect the question. It stands in the same relation to the present question as if it were one of the provisions now under consideration.

The principle, however, that, *independent of the terms of the bill of lading,* as between ship and cargo the right to general average arises out of *implied contract* and not out of some anomalous obligation of justice or equity was definitely settled by the House of Lords in the case of ANDERSON vs. OCEAN STEAMSHIP CO. 10 App. Cas. 107.

In that case, the question arose as to whether or not a cargo-owner was liable to contribution in general aver-

age for a salvage disbursement made by the owner of the ship. The claim of the ship-owner was stated in the following language:

"In consideration that the plaintiffs at the request of the defendants had taken on board a ship of the plaintiffs, called the Achilles, certain goods of the defendants to be carried on board of the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion in respect of the said goods of any general average loss that might arise or happen to the ship during the said voyage."

Of this the court said:

"I think that the promise stated in the first paragraph of the statement of claim is one *that would be implied by law in every contract for the carriage of goods.*"

So, we have as the settled law of England, not only the rule that the exemptions of the bill of lading apply to a general average liability as well as to all others, but also the unfettered proposition that general average liabilities are part of every contract for the carriage of goods, by implication of law, and not by the imperfect obligation of general justice or equity.

In this country the question has been more or less discussed from an academic point of view, but never, so far as we are advised, has it been directly passed upon except in two cases, to which we shall presently refer.

The history of this discussion is reviewed in RALLI VS. TROOP, 157 U. S., 394, et. seq. That the court did not deem it necessary in the case before it to determine the question is apparent from the following:

"There has been much discussion in the books as to whether the right to a general average contribution rests upon natural justice or upon an implied contract or upon a rule of the maritime law known to, and binding upon, all owners of ships and cargoes, but the distinction has been rather as to forms of expression than as to substantial principles or legal results."

In its review of the English cases ANDERSON vs. OCEAN STEAMSHIP CO. does not seem to have been noticed.

In the ROANOKE however, 59 Fed. 161, the question for the first time, as we think, comes up squarely for decision. The ruling is, however, based upon SCHMIDT VS. STEAMSHIP CO., and CROOKS VS. ALLAN, both of which, as we have already seen, are no longer law in England. So far, therefore, as the ROANOKE rests upon authority, it must be erroneous.

The ROANOKE is also to be distinguished from the case at bar in this, that it does not appear that the bill of lading contained any provision concerning general average. In fact, it does appear that the bill of lading was one for a carriage by water *or rail* (p. 165). Accordingly the court said that "the terms here employed do not warrant a holding that it [general average] was *in the minds of the parties to this contract of affreightment as touched thereby.*"

If the rule in Crooks vs. Allan be accepted, the foregoing fact would bring the Roanoke within that rule, while the facts in the case at bar would bring *this* case within the exception, because the terms employed *do*

warrant a holding that general average was in the minds of the parties to this contract of affreightment as touched thereby.

In WELLMAN VS. MORSE, 76 Fed. 573, the Circuit Court of Appeals for the First Circuit held precisely as did the House of Lords in ANDERSON VS. OCEAN STEAMSHIP CO., that the owners of a cargo are liable on an implied promise for general average, thus distinctly establishing in this country that the liability to contribution in general average arose out of contract, and not out of some indefinite obligation.

The French law in this particular is the same as that laid down in Carron vs. Park. See the Irrawaddy, 171 U. S. 199, et seq.

THE IRRAWADDY, 171 U. S. 187.—Some reference has been made to the Irrawaddy as laying down a contrary principle, but the question was not involved in that case. The only question raised was what effect on general average the Harter Act had because of the provision releasing ship-owners "from loss resulting from faults or errors in navigation or in the management of said vessel," etc. In passing upon the question, the court concluded: (p. 195.)

"But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling a ship-owner to claim in general average, *we do not think the cases are parallel.* By the English law the parties are left free to contract with each other, and each party can define his rights, and limit his liability as he may think fit. *Very different is the case where a statute* pre-

scribes THE EXTENT OF HIS LIABILITY AND EXEMPTION.

Upon the whole we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and *to limit the relief* from their operation *afforded by the statute to that called for by the language itself of the statute.*"

In other words, the court refused to extend the operation of the statute by implication, but confined it to the purpose stated.

In the words of the court, "We do not think the cases are parallel."

In view of the foregoing, we respectfully submit that the provisions of the bill of lading in question apply as well to liability for general average as to any other loss or damage. If so, under the provision of the bill of lading hereinbefore marked "(b)", the libel in this case should be dismissed.

Bill of Lading provision marked "(c)."—It will not be overlooked that this provision of the bill of lading hereinbefore quoted contains a stipulation that "all claims for . . . damage shall be *ascertained and adjusted* upon the same basis of value." The word "adjusted," used in this connection, bears no reasonable construction other than as referring to an adjustment in general average, for, outside of an adjustment in general average, there is nothing further to be done after the claim is "ascertained" other than to settle or pay, but, in general average, before the settlement or payment

there must be an adjustment in order to ascertain the contributory amounts. If this be so, that provision of the bill of lading has certainly been disregarded in making up the adjustment here under consideration.

Bill of Lading Provision Marked "(d)."—It also appears that the libelants have insurance to the extent of $15,000 on this property to the benefit of which the shipowner would be entitled under this provision.

II.

IF THE ADJUSTMENT BE CONCEDED TO BE THE BASIS OF LIBELANT'S RIGHT, THEN THE COURT ERRED IN ENTERING JUDGMENT AGAINST THE SHIP-OWNER, FOR THE ENTIRE AMOUNT TO BE CONTRIBUTED TO THE LIBELANT, INSTEAD OF FOR THE SHIP'S INDIVIDUAL OR PROPORTIONAL CONTRIBUTION.

1. We do not overlook the allegation in the libel (Art. VI, p. 17), that the master delivered the cargo at Nome to the consignees without taking or demanding any bond or other security for the payment of contributions in general average. This allegation is not supported by the evidence, as we shall presently see. Nevertheless we contend that the mere fact of delivery of the cargo without taking security, is not in itself sufficient to charge the ship with the entire contribution.

It will be noted that the libel also states (Par. VII, p. 17), "That there was at said Nome at the time of the arrival and discharge of said vessel, no government, courts nor other means by, under, or through which contribution in general average could have been *ascer-*

tained, adjusted, assessed or paid.'' Hence, if called on to detain the cargo, the master would have no alternative other than to bring it back to the port of departure where ''contribution in general average *could* have been ascertained, adjusted, assessed or paid.'' A detention of the goods for the purpose of enforcing the lien, was, therefore, impracticable, and in any event would have been ruinous to all of the consignees alike, the libelants as well as the rest.

The evidence is also undisputed that an average bond was impracticable, which must also be apparent from the conditions mentioned in the foregoing article of the libel.

Having this in view, the evidence shows that reasonable efforts were made to adjust the damage by such means as were at hand, and to obtain such security as was then practicable.

In the language of the adjuster's certificate (Libelants' Ex. 5, p. 151), ''The charterers at once procured the services of a Mr. Gollin, surveyor of the Board of Marine Underwriters of San Francisco, to examine and report upon the damage to the cargo. Owing to the peculiar conditions existing at Nome most of the consignees were in a great hurry to get their merchandise, even though it was damaged to a considerable extent; therefore, after a conference between the charterers and Mr. Gollin, it was decided to let those consignees who were not insured, and whose goods were damaged *over ten per cent,* take their merchandise, without making any deposits, in consideration of their agreeing not to make any claim in

general average for damage to the same—ten per cent having been fixed upon as an estimated percentage of general average. Those whose goods were delivered sound, and damaged *under ten per cent* of their value, were required to make a deposit. Those consignees who gave satisfactory proof that they were insured were allowed to take their merchandise without making a deposit. An examination and report upon the condition of the goods was made in each case by Mr. Gollin where there was no possibility of any claim being made, *i. e.*, those cases where the damage was under ten per cent, and the consignees did not waive their claim, and those cases where the goods were insured."

This statement is supported by the testimony of Mr. Gollin (p. 159), and that of Mr. Wood (pp. 767-8; 771-2-3).

We have, then, at least this much security retained for contribution in general average. All goods damaged in excess of ten per cent were released, because their damage was thought sufficient to release them from any liability to contribute, and all contribution to which *they* would be entitled was waived. So far as such goods are concerned the libelants suffered no damage, but, on the contrary, reaped a benefit, because they (libelants) were relieved from contributing to the excess damage of such cargo. The cargo *that was insured* had sufficient security behind it, without an additional bond, because the insurance is liable for the contribution, and the locality of the insurance companies was obtainable.

There does not appear to have been any goods damaged

less than ten per cent (p. 772), and "no goods were delivered from the ship without such an adjustment of damage."

From the foregoing it appears that the representatives of the ship took such *reasonable* precautions as were then and there available to secure proper contribution in general average. If they erred in the amount, that in itself would not render the ship liable for the whole contribution.

The obligation of the owners in respect to taking security for the contribution in general average is no greater than it is in respect to the original general average sacrifice, and in that regard it is settled by the Supreme Court that:

"The obligation of the owner is to appoint a competent master having reasonable skill, judgment and courage; and they are liable if through his failure to possess and exert those qualities, in any emergency, the interest of the shipper is prejudiced, *but they do not contract for his infallability, nor that he shall do, in any emergency,* precisely what, after the event, others may think would have been best."

LAWRENCE vs. MINTON 17 How. 100; 15 L. Ed. 62.

The language of MR. JUSTICE WILLIS, in the case of NOTARA vs. HENDERSON (1872) L. R., 7 Q. B. 225, where the duty of the master to act for the preservation of damaged cargo was under consideration, is applicable to the present case. On the question of fact whether there had been a breach of said duty, he said:

"It is obvious that a proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. *A fair allowance ought to be made for the difficulties in which the master may be involved.* . . . The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril, in short, all circumstances affecting risk, trouble, delay and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of the unfortunate result, unless it can affirmatively be made out that he has been guilty of a breach of duty."

The justice of this position with relation to the present controversy cannot be doubted. As said by Lowndes on General Average (p. 336):

"When a ship arrives at its port of destination subject to a claim for general average, the ship-owner finds himself in a position of some difficulty. An obligation, it is now clear as it has long been thought, is imposed on him, not to part with the goods until he has taken *reasonable* measures towards enforcing, as against each consignee, the lien which exists at the moment of the ship's arrival. This he can only do either by detaining the

goods, or by taking from the consignee, before parting with them, some fair equivalent in the shape either of a deposit of money or satisfactory engagement to pay. But it greatly concerns the merchant to obtain his goods without delay, so as not to lose his market; while it is impossible for the ship-owner, without some, and often a long delay, to ascertain the exact amount payable. Some reasonable arrangement, therefore, has to be come to: *and it is by no means easy to determine what arrangement would be reasonable, so as to balance the conflicting claims of ship-owner, merchant, and underwriter.*"

The difficulty of determining what is "reasonable" is evidenced by the discussion which follows, respecting a reasonable or unreasonable average bond, in the course of which appears the following from the judgment of Mathew, J., in HUTH vs. LAMPORT (Lowndes, pp. 339-340). Speaking of the right of a ship-owner to retain the cargo until payment of the amount has been made, the judge says that the authorities to which his attention had been called do not justify the contention that any such right exists, and proceeds:

"If it had been a question of lien, and if the ship-owner had called upon the consignee to deal with his lien, the question of amount would immediately have presented itself, *and a more onerous and difficult position for a ship-owner to place himself in cannot be imagined.* He would be bound to give up the goods upon having a proper tender made to him. In order to enable a proper tender to be made he would be bound to give the necessary information to the consignee; and then he would

run very great risk of asking too much or too little, a risk to the other consignees in the one case, and a risk to the particular consignee in the other."

This seems to state with much fairness the difficulty with which the ship-owner was confronted in the present case, and having done what then appeared to him most reasonable and practicable, he did all that we think the law requires of him.

In this connection, it will not be lost sight of that the foregoing language was used by the court with reference to the landing of cargoes at ports where the facilities of a civilized community, at least, are at the disposal of the master. A reasonable exercise of his authority at such a place would, in the very nature of things, require very much more of the ship-owner than what would be required of him under the conditions here under consideration.

If, therefore, we accept the adjustment, the amount which the ship-owner should contribute to the libelant would be 21 92-100 per cent thereof.

For this reason, if for no other, we respectfully suggest that the decree be set aside.

III.

THE JUDGMENT UPON WHICH THE DECREE IS BASED IS INACCURATE AND IMPERFECT, AND SHOULD HAVE BEEN REJECTED.

1. We think the libelant should be limited to the amount of loss found by Mr. Gollin, and for which he issued a certificate, to wit: $3,617.03.

Assuming that the examination of Mr. Gollin was not as thorough as it might have been, nevertheless, the libelants received the possession of the goods. They knew that the ship was depending upon that survey for the amount of the damage to be claimed by them, and whether it be true or untrue, that they agreed to accept said survey as final, they certainly did accept and take away their goods without any immediate protest, and thus made it impossible for the ship-owner to make any further or other investigation. Not that alone, but they themselves, after making a further investigation, filed an affidavit showing the damage which they had suffered to be only about one-half of that subsequently claimed. On this they rested for a period of two years, when they filed a supplemental affidavit increasing their damage to nearly $20,000. This, in itself, carries with it the badge of fraud. Of course, the ship-owner is powerless to contradict the testimony, for everything is now in the libelant's own hands, but the nature of libelant's own testimony as to values at Nome discloses the free hand with which they have increased their damage. 100 per cent, "200 per cent" of estimated profit is not a circumstance. Claim is made by one witness of "1000" per cent profit.

In the face of this, it must be borne in mind that a very large portion of this cargo was not merchantable cargo at all, but consisted of knocked-down lumber for a theatre, saloon and dance hall, and all the various paraphernalia necessary for carrying on such theater, saloon and gambling den. That it had no market value must be apparent, in that these were individual enterprises in which the element of bargain and sale did not enter. It

must further be borne in mind that these immense profits are based upon the idea that a market could have been found *immediately upon the arrival of the vessel,* for within three or four weeks thereafter the excitement and inflation had subsided, and the disappointed adventurers were disposing of their wares at any price they could get. To some extent this appears in the testimony in this case, but whether it appears to the extent here stated or not, it is an historical fact, of which this court is cognizant, and of which it will take judicial notice.

The whole transaction, therefore, carries upon its face the badge of fraud, and the ship-owner was justified in declining to accept it. The District Court recognizes that it is incorrect, but thinks that "it was fairly and honestly made by a competent adjuster." Granted. The honesty and competency of the adjuster is not in issue. He can only work with the facts that are presented to him, and the fairness and honesty of the libelant who presented the adjuster those facts is the only issue.

2. The testimony shows that a large portion of the goods that were allowed to participate in the general average were injured by fire or smoke, and no segregation is made of the amount of damage done by fire and smoke and that done by steam.

Under these circumstances the entire article should have been thrown out, and not allowed to participate in the contribution.

RELIANCE MARINE INSURANCE CO. vs. NEW YORK & C. MAIL S. S. CO., (C. C. A.), 77 Fed. 317. *Burden of Proof.*—In this case the court found that the

tobacco in question was damaged by what the witnesses "call in varying language, 'smoke, heat and moisture,' or 'smoke and heat,' or saturation with a 'smoky flavor,' and that the tobacco, which is a plant of peculiar sensitiveness, had absorbed the flavor or odor of smoke, whereby its quality was greatly injured."

The court also finds that this damage was caused by two separate means, first, by the natural penetration of the smoke from the fire, and secondly, further damaged by the pressure of steam which carried the smoke and its contents.

That of these two sources of damage, one was not a general average charge, while the other might be.

That is was further impossible to tell the amount of damage which was caused by the pressure of steam, as distinguished from the amount of damage caused by the unaided presence of smoke.

The damage to cargo which was caused by fire or smoke is not allowed in general average. The damage caused by water or by steam which was introduced as a means of suppressing the fire, *is* allowed.

Accordingly, the court held that there being an ordinary and extraordinary smoke damage, and no one could tell how much was ordinary and how much extraordinary, it was unnecessary to consider what might or might not be a proper rule of adjustment in a case where such damages *are* susceptible of an exact separation, and affirmed the decree of the District Court disallowing compensation in general average.

In view of the foregoing decision, we call the attention of the court to the following testimony:

A. G. LANE, Handled the cargo from Company's warehouse to the Standard Theatre warehouse. Part of it was burned, and *all of it scorched and water-soaked and all of it steamed.* A great part of the cargo was ruined. Handled all of that cargo after it was unloaded at Nome.

BAR FIXTURES. "Nothing there but so much scorched lumber." (pp. 304-5.) There was one end of the bar that was considerably charred, and it had to be all scraped off and of course that marred it to a considerable extent. One end of the back bar and front bar was badly scorched, but the rest of it simply came to pieces." (Lane, p. 333.)

MIRROR. A mirror was broken by *heat* in the hold. (Lane, p. 334.)

MATTRESSES. "Scorched on the end so the end was out of the hold below and the wool and everything coming out, and the end that was not scorched was all soaked." (Lane, p. 335.)

GROCERIES. "The groceries were destroyed. There were some few canned tomatoes and a few little things that happened to be away from the fire that did not melt and the water did not do it any material damage." (Lane, p. 336.)

DRUGS. "It was a quick fire and the chloride of lime and paraffine wax was all destroyed by the heat." (Lane, p. 336.)

CHAMPAGNE. "Fared worse than anything in the

hold that was not actually burned. The water just simply—the heat seemed to have ruined it. . . . I recall now that there was some cases we found that were so far from the fire and kind of covered up or something that they were not destroyed, but I should say 70 per cent of the champagne was destroyed." (Lane, pp. 336-7.)

CHAMPAGNE. "A few cases had been close to the fire—some of them—a few cases, I think; a few of them were scorched a little in the first lot." (Peterson, p. 482.)

"*Mostly all* damaged by *heat* and steam. There was one place the fire burned some of the cases, but not many of them, very few."

Q. Were any of the bottles broken by the fire, did you notice?

A. Yes sir—cracked—broken. The bottom was out of some of them—in very bad shape.

"One case was burned through and the others were scorched. Probably six, seven or eight cases were scorched." (Malloy, pp. 500-501.)

GUINNESS WHITE LABEL ALE. "The barrels were scorched." (Lane, p. 337.)

PORTER. "Same as the ale and whiskey."

ABSINTHE. "There was a ten-gallon keg of absinthe —that small stuff, as we call it—some of it was burned." (Lane, p. 338.)

CORKS AND LABELS. "Singed and wet, worthless and out of shape." (Gordan, p. 511.)

CORKS. "Showed discoloration by smoke; singed by fire; indication that it was in close proximity to the fire." (Gordan, p. 534.)

BAR GLASS. "Was broken by heat." (Lane, p. 339.)

"All the wines and bottled stuff was ruined by the heat." (Lane, p. 342.)

SCENERY. "The scenery was stuck stiff and the color run and some of it was scorched." (Lane, p. 346.)

PIANO. "The piano was in a box. The box was scorched on the outside. The piano was not scorched, heat and from the wax and stuff that ran down into it, and otherwise destroyed by moisture." (Lane, p. 368.)

CASE GOODS. "Were smoked. A barrel of crockery ware and glassware considerably. The ends of some of the champagne cases were smoked." (Lane, p. 370.)

WHISKEY. "Some of the barrels of whiskey, two or three of them, were scorched on the outside." (Lane, p. 371.)

DOORS. "Probably a quarter of them scorched on the end." (Lane, p. 371.)

CRAP TABLES. "Scorched on two of them, and one end of it." (Lane, p. 373.)

"It would indicate that it had been pretty hot; it was crusty; at the end of the boards there was a kind of crust that was a plain indication that it was from intense heat that would make wood crumble off like brown charcoal." (Lane, p. 373.)

CARPETS. "Steam and smoke; there was one bunch

I think was scorched a little, but not burned." (Peterson, pp. 492-3.)

LAY OUTS. "The heat completely ruined those." (Gordon, p. 508.)

ROLLS OF PAPER. "Heat had caused the tar to melt." (Gordon, p. 511.)

WINDOW SASHES AND WINDOW FRAMES. "Scorched by fire and showed evidences of heat as well. Generally damaged, probably 30 per cent at least." (Gordon, p. 517.)

DOORS. Damaged in same way as window sashes; some of them scorched.

CORRUGATED IRON. "Outwise of bales showed considerable bruising and apparently some effects of the heat, and was lot of warping." (Gordon, p. 517.)

SKELETON SAFES. "Blistered from the heat; looked like they were through the fire." (Gordon, p. 519.)

SEWER PIPE. "Cracked. Do not know how to account for it unless they were in the neighborhood of the extreme heat. Should say it was damaged through the extreme heat." (Gordon, p. 522.)

CIGARS. "Cases were charred; they had been near the seat of the fire where it had raged the fiercest, and the boxes were charred. A good many of them seemed to be affected by the heat; heat passed through them sufficiently to dry them out." (Gordon, p. 525.)

LIQUORS AND MINERAL WATERS. "No question

but the injury was caused by heat in some form, whether hot water or hot steam or flames, I am not able to say." (Gordon, p. 532.)

GLASS WARE. "The location of the stuff that was broken. . . . led me to the conclusion that the breakage had come from heat." Gordon, p. 533.)

CARPETS, WARDROBES, ROBES AND COSTUMES. "Doubtless smoke had something to do with it." (Gordon, p. 535.)

GLASSWARE. "Were broken; they were supposed to be where there was considerable fire." (Malloy, p. 670.)

In many instances when heat is spoken of, it is assumed that the damage is the result of steam heat, but no attempt is made to distinguish the steam heat from fire heat. As the adjustment for general average shows upon its face that a segregation was attempted, instead of throwing these articles out entirely, it is in that respect erroneous.

3. The District Court admits that it is erroneous with respect to the freight, but concludes that this error is favorable rather than unfavorable, to the claimant.

We have, therefore, three distinct respects in which the adjustment is inaccurate: 1st, By reason of inflated values and inflated items of damage. 2d, By reason of allowing contribution for articles damaged by fire and smoke and steam, without any proper evidence segregating the damage incurred in one respect from that incurred in another. 3d, By reason, as suggested by the

District Court, of failure to include the freight on certain articles.

With this in view, it is not proper for the District Court to give a judgment, which in itself is in the nature of an "average," when there is no difficulty in settling the matter according to the established principles of law and the facts, it being a mere matter of detail.

Respectfully submitted,

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